IN THE

# Supreme Court of the United States

OCTOBER TERM, 1946.

No. 264

WALKER-HILL COMPANY, A CORPORATION,
*Petitioner,*

*vs.*

THE UNITED STATES OF AMERICA,
*Respondent.*

## PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

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*To the Honorable, the Chief Justice and the Associate Justices of the Supreme Court of the United States:*

### A. PETITION.

Petitioner, Walker-Hill Company, an Illinois corporation of Chicago, Illinois, respectfully prays that a writ of certiorari issue to review the decision of the United States Court of Appeals for the Seventh Circuit rendered on May 17, 1947, reversing the judgment of the United States District Court for the Northern District of Illinois, Eastern Division, which had adjudged petitioner's eggnog to be a food product entitled, under Section 3250(1) of the Internal Revenue Code, to "drawback" of a fraction of the tax paid upon the alcohol contained therein.

## B. OPINIONS BELOW.

The majority opinion of the Circuit Court of Appeals is printed at page 135 of the record; the dissent at page 141. The case has not yet been officially reported. The opinion of the District Court is printed at page 93 of the record, but is not officially reported; its findings of fact and conclusions of law are printed at pages 95-97 of the record, and are officially reported at 66 F. Supp. 679.

## C. JURISDICTION.

1. The jurisdiction of this Court is invoked under the Judicial Code, Section 240(a), as amended by Act of February 13, 1925, ch. 229, 43 Stat. 938; 28 USC § 347(a).

2. The judgment of the Circuit Court of Appeals was entered on May 17, 1947 (R. 143).

## D. THE QUESTIONS PRESENTED.

1.

The construction of the phrase "food products • • • unfit for beverage purposes" in section 3250(1) of the liquor taxing laws. Does this phrase, unlike identical wording in previous liquor statutes, fail to include food products (such as petitioner's) which are incapable of producing intoxication, and which in addition lack all the usual characteristics of a drink?

2.

Should respondent be exempted from estoppel with respect to transactions already completed, and thus be permitted to retrospectively repudiate its commitment, in

circumstances where petitioner taxpayer submitted its product and recipe to the proper agency of government[1] for classification and was officially assured that the product had been scientifically examined and "is unfit for beverage purposes"; and where petitioner embarked upon the business of making and selling the product, and in accordance with the statute paid the entire liquor tax upon the alcohol used in making the same, in reliance upon the aforesaid ruling and its corollary that a portion of the tax would be returned to it under the "drawback" statute?

3.

The proper application of rule 52(a) of the Federal Rules of Civil Procedure, which provides that

> "Findings of fact shall not be set aside unless clearly erroneous * * *"

May the facts of experimental science with respect to the pharmacological action of petitioner's unique chemical composition—which scientific facts are correctly stated in the formal findings of fact of the trial judge who heard the uncontroverted testimony of the distinguished physician-toxicologist who established these facts—be summarily set aside as "clearly erroneous" simply because the Circuit Court of Appeals believes an inconsistency to exist between said facts and such extraneous attributes as the generic name by which the composition is called, the manner in which it is labeled, or the place where it is sold?

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A majority of the court below answered all these questions in the affirmative. If any one of these questions should be answered in the negative, then the court below must be reversed.

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1. The Alcohol Tax Unit of the Internal Revenue Service.

## E. STATUTE INVOLVED.

The "Drawback" Statute provides:

> "Any person using distilled spirits * * * fully tax paid in the manufacture or production of medicines, medicinal preparations, food products, flavors, or flavoring extracts which are unfit for beverage purposes and are sold or otherwise transferred for use for other than beverage purposes[1] * * * shall be eligible for drawback * * *" 26 U. S. C. (1940 ed.), Supp. V, Sec. 3250 (1).

This Court has never passed upon this statute, which was enacted October 21, 1942 (56 Stat. 972).

## F. STATEMENT.

Petitioner devised a semi-solid food concentrate (R. 23, 74, 76), which it called an eggnog, but which differed from ordinary eggnogs in containing extraordinarily large concentrations of eggs, sugar and milk (R. 33), together with 15% alcohol to preserve the product[2] (R. 34). The ratio of alcohol to fat and protein is so small that, when the product is eaten diluted or undiluted, the fat and protein inhibit absorption of the alcohol while it is being digestively decomposed, thereby preventing it from producing intoxication (Dr. McNally, R. 25). In addition, the product is so sweet and rich that it quickly cloys and becomes nauseating; consequently it is impossible to ingest an appreciable quantity of alcohol therefrom (R. 28, 75).

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1. The Act of Feb. 25, 1944 deleted the clause "and are sold or otherwise transferred for use for other than beverage purposes." (58 Stat. 68, Pub. Laws, Ch. 63.)

2. Actually, the proportion of alcohol was not enough to completely preserve the product, since the bottle in evidence has deteriorated somewhat.

Petitioner submitted its recipe, proposed front label bearing the name "Brandy Eggnog," and samples to the Alcohol Tax Unit, Internal Revenue Service. After proper consideration by the bureau's scientific experts and legal staff, the bureau officially advised petitioner that

"the preparation is unfit for beverage use" (R. 8).

In reliance upon this ruling, petitioner expended substantial sums in manufacturing, selling and advertising its eggnog. The price was set low during the period of price control in anticipation that drawbacks would be allowed. Having paid the full liquor tax upon the alcohol it used, petitioner filed its claims for "drawback," and upon rejection thereof, instituted this suit.

At the trial, Dr. Wm. D. McNally, a famous physician-toxicologist, was the sole expert witness. He described the experiments which he had performed on human subjects with petitioner's eggnog, and testified that the preparation was (1) a food (2) lacking the characteristics of a beverage, (3) unfit for beverage purposes, and (4) non-intoxicating (R. 25). The trial judge entered formal findings of fact conforming strictly to the testimony (R. 95, findings 6-10 incl.), and rendered judgment thereupon for petitioner (R. 101). The Circuit Court of Appeals explicitly rejected the trial court's findings of fact, and reversed its judgment (R. 135), one circuit judge dissenting (R. 141).

## G. SPECIFICATION OF ERRORS.

The Circuit Court of Appeals for the Seventh Judicial Circuit erred:

1. In holding that petitioner's non-intoxicating semi-solid preparation is a "beverage" within the meaning of the drawback provision of the alcohol taxing laws.

2. In refusing payment of the tax drawbacks which had already accrued to petitioner.

3. In reversing the judgment of the district court.

4. In setting aside the findings of fact of the trial court, in violation of the Federal Rules of Civil Procedure.

5. In refusing to apply the rule of *Miller* v. *Nut Margarine Co.*, 284 U. S. 498 (1932).

## H. REASONS FOR GRANTING THE WRIT.

### 1.

**The court below has construed the drawback statute in a manner conflicting with the court of claims and the congressional intent, so as to create confusion in the administration of the revenue laws of the United States.**

(a) *Conflict with the Court of Claims.*

At the option of the taxpayer, claims for drawbacks of less than ten thousand dollars may be prosecuted either in the Court of Claims or in the district courts. In *Hoffman Beverage Company* v. *The United States*, 71 F. Supp. 147 (decided April 7, 1947), a unanimous Court of Claims entered special findings of fact No. 5 that Tom Collins Mix and ginger ale

"were unfit for beverage purposes within the mean-

ing of Section 3250(l) of the Internal Revenue Code."[1]

The ginger ale was sold to be drunk to quench thirst. The Tom Collins Mixer was sold for mixing with gin to make intoxicating alcoholic highballs. In its opinion, the Court of Claims stated (p. 150):

> "It is agreed that the expression 'beverage purposes' in the statute means use as an alcoholic drink, and that, therefore, the plaintiff's use of the alcohol was a 'non-beverage' use within the meaning of the statute."

Consequently, it held that

> "* * * plaintiff * * * sold the soft drinks for use for other than beverage purposes." (p. 151)

The Government did not request certiorari in the *Hoffman* case.

The majority below in the instant case, on the contrary, construed the identical phrase of the same statute to hold that petitioner's highly nutritious, non-intoxicating, semi-solid food was a "beverage". *These two conflicting decisions, rendered within a few weeks of each other, are the only adjudications which the drawback statute has received.* Such conflict between a Circuit Court of Appeals and the Court of Claims has caused this Court to grant certiorari in the past:

> *Helvering* v. *Intermountain Life Ins. Co.*, 294 U. S. 686, 689 (1935).

The conflict between the Court of Claims and the Court of Appeals for the Seventh Circuit is aggravated by the exactly even division of opinion within the Seventh Circuit itself. One circuit judge voted to affirm the trial judge; he was reversed by a second circuit judge and a district judge sitting by designation.

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1. *Hoffman Beverage Company* v. *U. S.*, 71 F. Supp. 147, 148 (1947).

(b) *Frustration of the Congressional Purpose.*

In the *Hoffman* case, the Court of Claims stated the Congressional intent thus:

> "When Congress concluded that, in general, users of alcohol for purposes other than the manufacture of alcoholic drinks should not be required to pay, in addition to the former tax of $2.25 per gallon, the increase of $3.75 per gallon imposed, $1.75 of it in the Revenue Act of 1941, and $2.00 more in the Revenue Act of 1942, we can think of no reason why it would not have desired to give the benefits of its drawback provision to all those who came within its equity."[1]

The *Hoffman* decision conforms to the statement of policy made by Senator Millard F. Tydings when he introduced the Amendment forming the basis of the drawback statute, viz:

> "* * * a brief explanation of the amendment is that it is intended to abate the increase in tax on products using industrial alcohol which are food products or medicinal products, * * *
>
> "Under the amendment as drawn, the tax would be paid and then the taxpayer would be permitted to file an application for refund if he were able to demonstrate that the alcohol was used either in a food or medicinal product * * *
>
> "What I am pointing out is that part of the alcohol used for food products or medicinal products should not be subject to additional tax but let the present tax, which Heaven knows is high enough, stand." (87 Cong. Rec. Part 7, page 7366, Sept. 5, 1941.)

In *Campbell* v. *Galeno Chemical Company*, (1930) 281 U. S. 599, 608, and *Campbell* v. *W. H. Long & Co.*, (1930) 281 U. S. 610, 616, this Court construed the phrase "unfit

1. *Hoffman Beverage Co.* v. *U. S.*, 71 F. Supp. 147, 151 (1947).

for use for beverage purposes" in the Prohibition Act to mean "something which is not liquor". Accordingly

> "* * * courts have excepted compounds which are distinctively known and used as * * * culinary preparations, *no matter how large a proportion of alcohol they may contain, where they cannot practically be taken as a beverage for the sake of the alcohol which they contain*[1] because the effect of the alcohol is counteracted by other ingredients[2] or because of their systemic effects[3] if taken in excessive doses * * *" 48 CJS 138.

For example, *Alksne* v. *U. S.*, 39 F. 2d. 62 (1 C. C. A., 1930) held that (p. 69):

> "* * * it is the common understanding and was the intent of Congress so to declare that alcohol, whiskey, rum, etc., are all *intoxicating liquors,* and *therefore are to be considered fit for beverage purposes* within the meaning of the act, *unless rendered unfit by the addition of some other ingredient for that purpose.*"

Congress doubtless incorporated the phrase "unfit for beverage use" in the drawback statute, because the meaning of that phrase as the antithesis of "intoxicating liquor" was so well settled.

> "* * * where the words incorporated in a statute have acquired a specific meaning by virtue of judicial interpretation, such meaning should be accepted in the absence of some indication of a contrary legislative intention."—Crawford, *Statutory Construction,* Sec. 187 (1940).

The dissenting circuit judge below stated (R. 141):

"I do not believe it was the intent of Congress to

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1. Emphasis is petitioner's throughout the petition, unless otherwise stated.

2. As is the case with petitioner's product. Note finding of fact No. 9 (R. 96).

3. Nauseating action, in the case of petitioner's product. Note finding of fact No. 7 (R. 95).

impose the full liquor tax on those whose use alcohol in non-intoxicating products."

But the majority below whittled away at the statute, ignoring its history, by holding that drawbacks are to be denied

"unless it is clear that the spirits are used as a minor ingredient in the culinary Art"[1] "*solely*[2] for flavoring or preservative or as a food product."[3]

Petitioner submits that the court below should not be permitted thus to frustrate the fiscal policy of Congress.

(c) *This Court should correct the confusion in the law created by the decision below.*

Alcohol is used in a large variety of preparations of the kind named in the drawback statute. It is consequently of great importance that the construction of the statute be settled by this Court, in order that manufacturers may know to what types of preparation the drawback provision applies. Since the prices and general availability of many food products will depend upon the construction to be given to this statute, a substantial question of great importance to the public is involved. It should be answered authoritatively.

2.

**The court below has decided a question of estoppel involving the government, in a way probably in conflict with the applicable decision of this court.**

The present case is on all fours with *Miller* v. *Nut Margarine Co.*, 284 U. S. 498 (1932), wherein this Court held that the Government was estopped to repudiate a

1. R. 139.
2. The italics are those of the court below.
3. R. 138.

commitment upon which the taxpayer had relied, saying (p. 511):

> "Respondent commenced business after the product it proposed to make had repeatedly been determined by the Commissioner and adjudged in courts[1] not to be oleomargarine or taxable under the Act, and upon assurance from the Bureau that its product would not be taxed. For more than a year and a half, *respondent sold its product relying upon the aforesaid ruling that it was not subject to tax.* If required to pay the tax its loss would be seven cents per pound * * * It requires no elaboration of the facts to show that enforcement of the Act against respondent would be arbitrary and oppressive, would destroy its business, and reflect loss for which it would have no remedy at law."

The court below nevertheless withheld the drawback which had accumulated with respect to merchandise already sold, upon the pretext that the official ruling "that the preparation is unfit for beverage use" (R. 8) "must have been the result of a slip-up" (R. 140). There is no evidence whatsoever that the Alcohol Tax Unit, Internal Revenue Service, acted inadvertently or erroneously, or that it has since changed its standards or the application thereof to petitioner's product.

Petitioner recognizes that the Government cannot be estopped by the *unauthorized* or *illegal* acts of its agents outside the scope of their authority. But in examining and classifying petitioner's product, the Alcohol Tax Unit was acting within the scope of authority conferred by statute.[2] Petitioner further concedes the authority of the Alcohol Tax Unit to reclassify petitioner's product if and when the facts so warrant, and to deny drawback on

1. The product of the Nut Margarine Co. had not been so adjudged, but only similar products manufactured by others.

2. 26 U. S. C., Sec. 3176, 3170.

sales made after such notification. But, as the court below admitted (R. 140):

> "It never gives a satisfactory, reassuring feeling, however, for the Government to repudiate the act of one of its agents performed in the course of his duties."

The court's excuse for doing so was that (R. 141)

> "The rule against estoppel, however, is based upon the assumption that the Government's welfare, being of greater importance, outweighs individual injustices in particular cases."

Petitioner submits that "the Government's welfare" will not be advanced as much by the retention of $7,495.80 in this case, as it would be by the application of the doctrine of estoppel to avoid "individual injustice" to petitioner. For it is of gravest public importance that the government's conduct be such as to maintain the respect of its citizens, and not discourage them from believing its official acts, or acting in reliance upon them.

3.

**The decision below is based upon violation of the federal rules of civil procedure.**

In order to reverse the trial court, the court below had to set aside findings of fact Nos. 6-14 inclusive (R. 95-96). The opinion below especially attacks finding 8:

> "The expert medical testimony of record establishes that plaintiff's product is not intoxicating, and 'hat it is not a beverage" (R. 140, 96).

There was no conflict whatever in the evidence on this point, which described scientific investigations performed upon petitioner's product. The majority below violated rule 52(a) of the Rules of Civil Procedure by conducting an independent investigation as physicians and toxicologists, into the specific properties of petitioner's unique

composition, using as their scientific tool a **cook book** *dehors* the record, published years before petitioner's composition came into existence (R. 139).

Petitioner submits that an important function of civil procedure rule 52(a) is to protect appellate tribunals from the censure and loss of dignity and public confidence which is bound to develop when laymen undertake to decide the facts of experimental science.[1, 2]

During this term, this court has twice passed upon the Federal Rules of Civil Procedure,[3] but it has never passed upon the important procedural problem raised by rule 52(a). Petitioner prays the Court to do so.

## I.

## CONCLUSION.

The petition for a writ of certiorari should be **granted.**

Respectfully submitted,

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August, 1947.

1. *Cf.* the *ex cathedra* pronunciamento of 1616 that Galileo was wrong, and that the earth is flat and fixed at the center of the solar system. Article on Galileo, 9 Ency Brittanica 931 (14th ed.).

2. *Cf.* the Scopes trial to ascertain whether the theory of human evolution was false, *Scopes* v. *Tenn.*, 154 Tenn. 105 (1927), arising from a legislative pronouncement upon the facts and theories of science.

3. *Hickman* v. *Taylor*, .... U. S. ...., 67 S. Ct. 385, 91 L. Ed. 331 (Jan. 13, 1947). *Cone* v. *W. Va. Pulp & Paper Co.*, ....U. S. ...., 67 S. Ct. 752, 91 L. Ed. 683 (March 3, 1947).